Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSE M. BAEZA, JR.,
GONZALEZ TRADING, INC.,

Petitioners,

v.

NACCO INDUSTRIES, INC.,
JAMES S. FELTMAN,
YALE MATERIALS HANDLING CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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44 pp

QUESTIONS PRESENTED

I. Whether a new federal subject matter jurisdiction is to be created under "estoppel" and "waiver" theories that are inconsistent not only with the facts established on the face of a Magistrate Judge own order, but are to henceforth affect the limited jurisdiction of Courts of the United States which are to become instead courts of general common law jurisdiction under non-constitutional judges.

II. Whether the total factual absence in the record of a clear and unambiguous "consent" to a Magistrate Judge may be found under new or substituted federal appellate factual findings to occur ex post facto in the course of appellate proceedings absolutely without the "consent" of the party itself, all of which outside the scope of 28 U.S.C. § 636(c).

III. Whether a federal Appellate Court may properly hold in abeyance for more than 3 years, despite endless challenges to its own lack of federal subject matter jurisdiction.

IV. Whether an Appellant Court may find facts to create its lacking subject matter jurisdiction to then apply, same to give retroactive federal subject matter jurisdiction non-existing at the time of entry of multimillion dollar Magistrate Judge Judgments.

V. Whether a federal Court of Appeals may ignore that a severed trial has not been held in the case when the Magistrate Judge himself has denied having celebrated such severed trial, and the record shows that Petitioners trial has never taken place and which documentary fact in the record proves the lack of federal subject matter jurisdiction both at the Magistrate Judge level as well as at the Appellate Court level.

VI. Whether a final judgment in this case void because of lack of jurisdiction, may be attacked under Fed. Rul. of Civ. P. 60 (b).

Certificate of Interested Parties

America Discount, Inc.

Joe's Rental, Inc.

José M. Baeza, Jr.

Franchel Enterprises, Inc.

GT Americas, Inc.

GT Corporation

General Trading, Inc.

Goná Trading, Inc.

Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A.

Hyster-Yale Materials Handling, Inc.

NACCO Industries, Inc.

NACCO Materials Group, Inc.

Power Depot, Inc.

Yale Material Handling Corporation

Barnett Bank of Broward County

Cía Dominicana de Teléfono C x A

First Florida Savings Bank, FSB

G.T.E. International

Vartex Limited

World Art Foundation Limited

Richard Bandler, Inc.

International Brokerage, Inc.

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JAMES S. FELTMAN,
YALE MATERIALS HANDLING CORP.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

This petition by José M. Baeza, Jr. (Baeza, Jr.) and González Trading, Inc. (González) is for the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment and opinion entered on September 3, 1997 and for additional relief vacating

such judgment. A timely rehearing en banc motion was denied by the Court of Appeal on December 1, 1997.

OPINION OF THE APPELLATE COURT

The unreported opinion issued by the District Court below is Appendix "A", infra. The unreported affirmance on September 3, 1997 by the 11th Circuit Court of Appeals appears at Appendix "B". The denial of reconsideration en banc is Appendix "C". The admission of failure to comply with 28 U.S.C.§ 754 is Appendix "D".

REASONS FOR GRANTING THE WRIT

1. THE VITAL SEPARATE FEDERAL SYSTEM AND LONG ENDURING LIMITED JURISDICTION OF FEDERAL COURTS IS NOT BE DISCARDED AND SUBSTITUTED BY A NEW ESTOPPEL AND WAIVER MAGISTRATE JUDGE MADE FEDERAL SUBJECT MATTER JURISDICTION.

2. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR DECISIONS IN BELL v. HOOD, 337 U.S. 678; AND ALLOWS THE APPLICATION OF AN IMPERMISSIBLE RETROACTIVE APPELLATE COURT MADE SUBJECT MATTER JURISDICTION CONFLICTING WITH MANSFIELD, COLWATER & LAKE MICHIGAN RY v. SWAN, 111 U.S. 379; AND OF CATERPILLAR v. LEWIS, 117 S.CT. 467.

STATEMENT OF THE CASE

Petitioners filed a diversity case for damages on respondent's abuse of process, intentional infliction of emotional distress, libel and defamation, violations of the 4th and 5th Amendments, and to declare Magistrate Judge judgments void. Instead of granting partial summary judgment for Plaintiffs the District Court granted defendants a total Summary Judgment. In its judgment the District Court dismissed the entire case after dismissing the merits of all of Petitioner's causes of action. The court rejected all of the complaint's verified facts. It adjudicated and found all such affidavit-attested facts to be lacking in merit. Such "fact-finding" summary decision entailed dismissal of the complaint's facts without defendants filing a single contradictory sworn statement. As a second consideration, the District Court made a follow-up dismissal. That second decision was based on the existence of federal subject matter jurisdiction of a Magistrate Judge on res judicata grounds, supported by "orders" issued in another case. That other case is the subject of Petition No. 97-1239 pending before this Court. The District Court relied on an order of a District Court Judge issued without jurisdiction on its own face and of the Magistrate Judge himself in such other case. Having made the double dismissal of Petitioners entire case, the District Court then granted leave for Respondents to file a Rule 11 motion against Petitioners for having challenged lack of federal subject matter jurisdiction of a federal court.

THE FACTS

This diversity case was filed in the District Court in Puerto Rico because a 46.6 feet long Bertram Yatch was tortuously and illegally taken in Puerto Rico without any semblance of compliance with either Puerto Rico or Federal law.

The defendant Feltman did not have jurisdiction to act in Puerto Rico because he did not register his order of appointment as receiver, as required by law, [Appendix "D", 28 U.S.C. § 754]. In the Puerto Rico forum Respondents refused to accept the effectiveness of summons to litigate thereat. They sought transfer of the complaint to the Southern District Court in Florida. The District Court in Puerto Rico granted the transfer.

Thereupon Respondents, who are all of diverse citizenship from that of Petitioners, would still not litigate nor face a jury on the merits of the complaint. In Florida, Respondents sought instead dismissal of the complaint. They did not counterclaim or otherwise tried asserting the numerous "judgments" that had been issued by the same Magistrate Judge. Respondents evaded completely litigating Petitioner's complaint. They refused all discovery depositions, interrogatories and requests for admissions. Respondents proposed dismissal of the complaint based on an "order" which had been issued by a District Court in another case. That particular "order" did not mention the multimillion dollar judgments that the Magistrate Judge had issued and were being questioned below under Fed. R. of Civ. P. 60(b). The other District Court's October 24, 1996 had been issued despite acknowledging in its very face that it did not have jurisdiction to issue such order. In that order, after stating that the Court did not have jurisdiction to issue the order, the Court went on to find that it could nevertheless discuss and make fact findings about Petitioner's missing consents "to attain federal subject matter jurisdiction on the basis of "estoppel" and "waiver" and thus sustain the Magistrate acting as a District Court Article III Judge and the multimillion dollar judgments that the said Magistrate Judge had already issued. Such order also gave an opinion on the unheard and novel theories as to how to "infer" of "imply" consent by conduct and "waiver" of the parties for the creation of such federal

subject matter jurisdiction. Those theories failing, the order also advanced a common law "laches" theory in which "consents" matured or aged after the 2 1/2 years of litigation which had preceded between "some" of the parties.

Further attacking the complaint at bar, Respondents based their motion to dismiss below on yet another "Order". That second federal subject matter jurisdiction-conferring "order" had been issued by the Magistrate Judge himself. Such other jurisdictional "order" was dated May 23, 1994. There were thus, not one but two "orders" that Respondents asserted below as basis for a res judicata application. Both "orders" were to "provide" the Magistrate Judge with retroactive federal subject matter jurisdiction to support the validity of the Magistrate Judge void judgments. The Magistrate Judge had issued two judgments for over 3 million dollars, in the face of Petitioner's missing 28 U.S.C. § 636(c) "consents". That absence of consents was the sole need for using the "estoppel", "waiver" theories.

Respondents insisted on dismissal of Petitioner's complaint. They asserted that the action was also dismissable on the merits.

The District Court accepted the arguments of Respondents and that both "orders" required adoption. The District Court entered summary judgment also dismissing on the merits the complaint. The judgment issued was to operate as a substitute of the October 24, 1994 order supplying alternatively Petitioner's missing "consents". The direct and unequivocal consequence was to reinstate and to validate void Magistrate Judge multimillion dollar judgments under challenge in the complaint as provided for under Fed. Rul. of Civ. P. 60(b).

Petitioner's attempted to conduct all the discovery they could but Respondents defied and totally evaded all federal subject matter discovery. Respondents charged below that

Petitioner's had "waived" in the other case their constitutional rights to an Article III Judge. "Objections" to the referral had been claimed by the Magistrate Judge to be unavailable at such "late date". The theory as claimed by Respondents was: "If you take too long, you are barred from claiming lack of federal subject matter jurisdiction"..

More than a year elapsed in the District Court, and then summary judgment was suddenly entered below. Petitioner's had filed affidavits before the District Court. Those affidavits left no doubt on Petitioner's factual absence of "consent" to the Magistrate Judge. Respondents did not present a single counter-affidavit on the lack of "consent" to the Magistrate Judge. On such an unopposed factual jurisdictional basis and circumstances Petitioner's filed a motion for partial summary judgment because Respondents would never be able to file-counter- affidavits on such factual issue of lack of consent.

A few days after the posting of an additional $2.8 million dollars supplemental supersedes bond in the other case (CIV-88-0061), the vital factual issue of failure to "consent" to the Magistrate Judge, was resolved in favor of Respondents. The District Court adopted all of Respondent's federal subject matter jurisdiction by "estoppel-waiver-laches" theories, as a first in the annals of federal jurisprudence.

ISSUES PRESENTED

1. THE VITAL SEPARATE FEDERAL SYSTEM AND LONG ENDURING LIMITED JURISDICTION OF FEDERAL COURTS IS NOT BE DISCARDED AND SUBSTITUTED BY A NEW ESTOPPEL AND WAIVER MAGISTRATE JUDGE MADE FEDERAL SUBJECT MATTER JURISDICTION.

2. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR DECISIONS IN BELL v. HOOD, 337 U.S. 678; AND ALLOWS THE APPLICATION OF AN IMPERMISSIBLE RETROACTIVE APPELLATE COURT MADE SUBJECT MATTER JURISDICTION CONFLICTING WITH MANSFIELD, COLWATER & LAKE MICHIGAN RY v. SWAN, 111 U.S. 379; AND OF CATERPILLAR v. LEWIS, 117 S.CT. 467.

ARGUMENT

The District Court, at page 4, of its decision which in Appendix "A" hereto, states:

> In order to fully understand the instant action, it is necessary to review certain rulings that were made in the Bandstra/Zloch Litigation.

What the District Court meant is that its fact finding of Respondents 28 U.S.C. § 636(c) "consent" to a Magistrate Judge, whose void judgments were being challenged, was to be found in another case. That case is the one where a Petition for Certiorari is now pending before this Court under case no. 97-1239. In that Petition the Petitioners question the fact finding made at the appellate level by a United States Court of Appeals to create federal subject matter jurisdiction retroactively where it did not previously exist. Such appellate fact findings were made to appear in the reported decision. They were made at General Trading v. Yale Materials Handling Corp, 119 F.3d 1485 (11th Cir. 1997), under various intermingled headings:

I) B) Referral of underlying litigation to a Magistrate Judge.
D) Challenges to the Magistrate Judge's authority.
V) Discussion
A) Whether 28 U.S.C. § 636(c) was satisfied

1) Whether GTI, Baeza Sr., Baeza Jr., and González Trading conserted to appear before the Magistrate Judge.

The erroneous appellate factual findings of "consent" of Petitioners took more than 3 years to be made to create federal subject matter jurisdiction at the appellate level and in turn support the jurisdiction of the Court of Appeals itself which had been specifically challenged. It is clear, and unusual, that such jurisdictional "findings of fact", had nothing to do with the "merits" of any appeal on multimillion dollar Magistrate Judge judgments. It stands out in this case that an appellate remand for factual findings could not be made because the non-article III Magistrate Judge would not be able to undertake making ex-post facto findings to sustain his own judgments for millions of dollars. The Court of Appeals erroneously decided to make up such jurisdictional findings of fact. This is what it did, to thus furnish and apply retroactive federal subject matter jurisdiction to the already issued judgments. But in doing so it overlooked that the Magistrate Judge himself had made just the opposite fact findings when the Magistrate Judge openly accepted on September 30, 1992 that Petitioner Baeza Jr., had not consented to the Magistrate Judge nor had waived his right to trial by jury, which is a well known fundamental right. That trial has never taken place and the Court of Appeals erroneously did not take into consideration Petitioner Baeza, Jr. still extant right to such jury trial. That the Court of Appeals was fully aware of such severed pending trial is unquestioned because it is plainly acknowledged at footnote No. 7 of its reported opinion. Petitioners claim a remedy before this Court for such vital omission in the Certiorari Petition filed under number 97-1239. There, in appendix marked "B" thereto, the Magistrate Judge's own acknowledgment appears as made for the severed trial still pending.

This Court has long ago, and many times, reiterated the constitutionally required limited jurisdiction of federal courts. As such it appears in the landmark decision of Mansfield, C. & L.M. Ry. Co. v. Swan 111 U.S. 379 (1884). To apply that case, decided over a hundred years ago, to the procedural facts and the judgment (order of dismissal) entered below, it appears that such judgment was entered on the docket on March 13, 1996 (Appendix "A" hereto). The Respondents endeavors to evade essential jurisdictional prerequisites and to supply the missing Petitioner's "consents" via "estoppel", "waiver", "latches", and which efforts succeeded at the appellate level, took place when the Court of Appeals on August 22, 1997 issued its printed opinion, that is, sixteen (16) months after the judgment below had been entered.

The remarkable application of retroactive federal subject matter jurisdiction shown in the case at bar is deemed by Petitioners to be impermissible under Mansfield, supra. See also National Presto Industries v. Dazey Corporation, 107 F.3d 1576 (Fed. Cir. 1997); Denberg v. U.S.R.R. Retirement Bd., 696 F.2d 1193(7th Cir. 1983). After multimillion dollar judgments were entered by a non-consented to Magistrate Judge the Court of Appeals could not "cure" its own lack of jurisdiction nor that of the Magistrate Judge's equally missing federal subject matter jurisdiction. It could neither destroy Petitioner's acknowledged (Footnote 7) pending jury trial of his severed counterclaim. It was clearly not a matter of defective allegations that could be cured or amended under 28 U.S.C. § 1653. The facts findings made by the appellate court to create Baeza Jr's "consent", that was found lacking by the Magistrate Judge's own footnote, as shown in Appendix "B" to Petition for Certiorari, Case No. 97-1239, is entirely the creation and expansion of federal subject matter jurisdiction, to be applied retroactively where it did not previously exist. See: Aetna Cas. & Sur. Co. v. Hillman, 796

F.2d 770 (5th Cir. 1986). By its date, the judgment of dismissal was entered below 16 months prior to the finding of "consent" made at the appellate level. The appellate decision is erroneous because subject matter jurisdiction must exist at the time of entry of a judgment by a federal Court, Caterpillar, supra, and the District Court below, surely, at the date of entry of its judgment of total dismissal of the complaint could not guess that the Appellate Court would engage in any such retroactive appellate fact findings of "consent". Nor did the District Court below provide any findings as to how it resolved such controverted factual issue to then state the unsupported conclusion, as made at page 17 of its decision, in which it found Petitioners factual consent to have been given in a case other than the one that was before it.

The District Court used below an order of another case in which the order itself stated that it was being issued without jurisdiction. It also used another order where a Magistrate Judge declared himself with federal subject matter jurisdiction based on conduct of the parties. The District Court nevertheless stated:

> However, a review of the record shows that there was consent to Magistrate Judge Bandstra's conducting trial in the Bandstra/Zloch Litigation and entering judgment therein. Furthermore, the record reveals that this same objection to Magistrate Judge Bandstra's jurisdiction was raised and rejected in the Bandstra/Zloch Litigation. Currently, the issue is pending before the Eleventh Circuit Court of Appeals and should not be relitigated here. Therefore, Count V is hereby DISMISSED. (Underline ours).

If the record in the other case showed that there was "consent" of the Petitioner's to the Magistrate Judge

conducting a trial and entering judgments, what was the need then for the Magistrate Judge's footnote saving the severed trial of Petitioner Baeza Jr., which would remain and is totally in limbo and is specifically mentioned at footnote 7 of the appellate decision? When is that trial going to take place? If "consent" was indeed to be found in the record of the other case there would have been absolutely no need to try to supply such lack of "consents" by resorting to non-statutory common law ex-post-facto theories of "estoppel-waiver-laches". A mere reading of such theoretical expressions, shows them to be totally the contrary to any expressed "consents". That is so because those theories are instead full admissions on the absence of any such "consents".

Moreover, the two "orders" used by the District Court below to apply res judicata were orders inescapably void on their very face because neither order complied with 28 U.S.C § 636(c). There was also shown an open lack of jurisdiction in both to do any such determinations because both lacked jurisdiction for their issuance. In the first order because the District itself acknowledged such lack. In the second because the issuing authority was a Magistrate Judge without Article III jurisdiction to provide himself with such authority. The record in a federal court must show, on its face, that the court has the authority to issue the judgment. In Olivera v. Grace, 122 P.2d 564 (1942) [140 ALR 1328] the court stated:

> "Similarly, a court has inherent power, apart from statute, to correct its records by vacating a judgment which is void on its face, for such a judgment is a nullity and may be ignored. (Emphasis ours)

A "void" judgment for lack of federal subject matter jurisdiction may not acquire validity because of "laches" on the part of the judgment debtor. In Re Center Wholesale, Inc.,

759 F.2d 1440 (9th Cir. 1985); Klugh v. United States, 620 F. Supp. 892 (D.C.S.C. 1985).

One of the summary judgment "supporting" "orders" was very plainly issued by a Magistrate Judge, which order in and of itself does in fact, shows the exercise of a non-Article III special statutory jurisdiction. In such event the record must show, upon its face, that there was unambiguous "consent" given to the exercise of such special jurisdiction. See FICO v. Industrial Commission, 186 N.E. 605 (S.C. Ill. 1933).

In connection with the "supporting" jurisdictional "orders", which were and are void on their very face, it has been said:

> A judgment is not void merely because it is erroneous. It is void only if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with due process of law. In re Center Wholesale, Inc., supra.

Clearly then, if a judgment is issued by a Court that lacks federal subject matter jurisdiction, it is basic that such judgment may not be used for res judicata purposes since being an absolute nullity it is therefor non-existent. See: Wolfe County v. Talson, 140 S.W. 2d 674 (C.A.Rg. 1940). The court in Chaney v. Reddin, 205 P.2d 310 (S.C. Okla. 1949) [8 ALR 2d 337] plainly stated:

> "a judgment void on its face, which requires only an inspection of the judgment roll to disclose its want of validity is, a dead limb upon the judicial tree, which should be lopped off".

The doctrine of res judicata is therefore applicable only to judgments issued by courts of "competent jurisdiction".

The term "competent jurisdiction" has often been the object of definition by federal courts. See U.S. v. Williams, 341 U.S. 58, 715 Ct. 595 (1951); Kalb v. Feverstein, 308 U.S. 433, 605 Ct. 343 (1940); United States v. Munsingwear, 340 U.S. 36, 71 S. Ct. 104 (1950); Aquatherm Industries, Inc. v. Florida Power & Light Company, (11th Cir. June 16, 1996 Case No. 95-2077). See also Sewell v. Merill Lynch, Pierce, Fenner & Smith, ___F.3d ___, (11th Cir. Sept. 13, 1996, Case No. 95-4354). In United States v. Morton, 467 U.S. 822, 104 S. Ct. 2769 (1984) this Court unequivocally stated:

> "If we were to look at the words "competent jurisdiction" in isolation, we would concede that the statute is ambiguous. The concept of a court of "competent jurisdiction", though usually used to refer to subject-matter jurisdiction, has also been used on occasion to refer to a court's jurisdiction over the defendant's person. We do not, however, construe statutory phrases in isolation; we read statutes as a whole. Thus, the words "legal process" must be read in light if the immediately following phrase- "regular on its face". That phrase makes it clear that the term "legal process" does not require the issuing court to have personal jurisdiction.
>
> Subject-matter jurisdiction defines the court's authority to hear a given type of case, whereas personal jurisdiction protects the individual interest that is implicated when a nonresident defendant is haled into a distant and possibly inconvenient forum. (Emphasis ours).

Lack of subject matter jurisdiction may be raised at any time and a party may not be estopped from raising it. There

are no exceptions. See Coury v. Prot, ___F.3d.___, (5th Cir. June 19, 1996 Case No. 94-20084).

To be sure, Petitioners maintain that in this case the District Court did not really examine the "orders" it used to dismiss their action to have the Fed. Rul. of Civ. P.60(b) attack of the null and void Magistrate Judge Judgments. It also overlooked the further lack of jurisdiction of the Respondent James Feltman who had not bothered to record his Magistrate Judge order of appointment in the Court in Puerto Rico as expressly required by the Congress. See the attendant lack of jurisdiction appearing on the open court admission made as to such failure to record, shown at appendix "D" hereto on the failure to comply with 28 U.S.C. § 754. In that connection this Honorable Court very recently stated in Oubre v. Entergy Operations, Inc., 118 S.Ct. 838 (1998), in dealing with an ADEA claim, and a federal statute that imposed duties, just as duties may be imposed by Congress on a federal receiver, as follows:

> Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: An employee "may not waive" an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids. (Underline ours).

Petitioner's respectfully feel that it should be likewise the duty of a federal receiver to comply with that which Congress required of him, prior to his validly taking someone's property in another district. The penalty imposed by Congress on such failure is the taking away of jurisdiction for all acts performed outside the law as were carried out in Puerto Rico. This case then is but one where the required federal

subject matter jurisdiction is lacking everywhere. The existence, at all times, of subject matter jurisdiction, is and has been strictly enforced by this Court for over the two centuries of existence of the Republic. The soul of the federal judiciary and the separation of the state and federal systems of justice, due to the limited jurisdiction of the federal courts, a system proven over 200 years, as envisioned by James Madison Jr., gives this case more than uniqueness and national importance due to a then possible impending breakdown of such a successful and proven system of limited power not to be expanded vía "estoppel jurisdiction". Caterpillar, supra, for the Petitioners gives meaning to the prohibition on retroactive application of post-judgment federal subject matter fact findings.

CONCLUSION

Petitioners respectfully request review and reversal by this Court of the unpublished judgment entered below with issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Dated: February 27, 1998.

Respectfully Submitted.

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-809-CIV-GRAHAM

JOSE M. BAEZA, Jr., et. al.,
Plaintiff(s),

vs.

NAACO INDUSTRIES, INC., et., al.,
Defendant(s).

ORDER GRANTING MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT AND DISMISSING CAUSE IN ITS ENTIRETY

SUMMARY DECISION

1. Renewed Motion to Dismiss and Memorandum of Law (DE 14); and

2. Defendants' Cross-Motion for Summary Judgment (DE 18).

AS MORE FULLY EXPLAINED BELOW, it is

ORDERED And ADJUDGED as follows:

1. Renewed Motion to Dismiss and Memorandum' of Law (DE 14) is GRANTED; and

2. Defendants' Cross-Motion for Summary judgment (DE 18) is GRANTED. It is further

ORDER AND ADJUDGED that this case is DISMISSED IN ITS ENTIRETY. It is further

ORDERED AND ADJUDGED that the parties shall brief the issue of Rule 11 Sanctions with more particularity. Defendants shall file a motion for Rule 11 Sanctions on or before March 29, 1996. Plaintiffs shall file an Opposition on or before April 15, 1996. It is further

ORDER AND ADJUDGED that all pending motions are DENIED AS MOOT.

STATEMENT OF UNDISPUTED FACTS

I. The Parties in the Case at Bar

Plaintiff Gonzalez Trading, Inc. ("Gonzalez") is a corporation which has its principal place of business in Rio Piedra, Puerto Rico.

Plaintiff Jose M. Baeza, Jr. ("Baeza Jr.") is a resident of Puerto Rico.

Defendant James Feltman, C.P.A. ("Feltman") of Arthur Anderson & Co., Miami, Florida was appointed receiver of the assets for Jose M. Baeza, Sr. ("Baeza Sr.") and General Trading, Inc. ("GTI") in the case entitled General Trading Inc. (plaintiff) v. Yale Materials Handling Corp. (defendant/counterclaimant/and supplementary plaintiff) v. General Trading, Inc., Gonzalez Trading, Inc., Jose M. Baeza, Sr. Jose M. Baeza, Jr. and Javier Baeza (counterdefendants/and supplementary defendants) and Power Depot. Inc., Michele M. Baeza and Encarnacion Gonzalez f/k/a Encarnacion Baeza (supplementary defendants), 88-61-CIV-ZLOCH (this case is hereinafter referred to as "The Bandstra/Zloch Litigation"). As receiver, Feltman was located and seize all assets that were owned by or under the control of Baeza Sr. and GTI. As various orders and judgments in The Bandstra/Zloch Litigation show, Baeza Sr. fraudulently transferred many of his assets to his children, including Baeza Jr. The record of the Bandstra-/Zloch Litigation also shows that the court invalidated those

transfers and ordered a lien or direct transfer of those assets to Yale Materials Handling Corp. ""Yale").

Defendant Yale is a Delaware Corporation with its principal place of business in Flemington, New Jersey.

Defendant NACCO Industries ("NACCO") is the parent company of Yale.

II. Allegations of the Complaint in the Case At Bar

Plaintiffs allege that on or about December 14, 1994, defendants illegally seized a Bertram Yacht called the Pit Bull by filing Urgent Motion Authorizing Receiver to Take Possession of Asset (hereinafter referred to as "Urgent Motion"), in the United States District Court of Puerto Rico in General Trading, Inc. v. Yale Materials Handling Corporation, etc., Misc. 93-0007 (PG)/88-0061-CIV-ZLOCH/BANDSTRA.

Although the actual causes of action asserted are not entirely clear from the complaint, it appears that plaintiffs have asserted the following against defendants: (1) abuse of process; (2) intentional infliction of emotional distress; (3) defamation; (4) illegal ex parte seizure of the vessel in violation of the Fourth and Fifth Amendments of the United States Constitution; (5) action to declare judgment in prior action void ab initio and punitive damages in the amount of $1,000,000 for an unconstitutional arrest of the Pit Bull; and (6) request for attorney's fees and costs pursuant to 28 U.S.C. § 1927.

III. The Bandstra/Zloch Litigation

In order to fully understand the instant action, it is necessary to review certain rulings that were made in The Bandstra/Zloch Litigation.

The Bandstra/Zloch Litigation arose from the parties' business relationship which began in or about 1982. Originally GTI was a dealer in forklifts which were manufactured by Yale. GTI

was a Florida corporation with its principal place of business in Miami, Florida. GTI's principal shareholder and president was Baeza Sr. As a result of the complete breakdown of the relationship between GTI and Yale, a lawsuit was filed in the Southern District of Florida entitled General Trading, Inc., v. Yale Materials Handling Corporation, 88-61-CIV-ZLOCH. In that case, Yale filed counterclaims against GTI, Gonzalez Trading Inc., Jose M. Baeza, Sr., Jose M. Baeza, Jr. and Javier Baeza.

The bench trial of the matter was initially commenced before the Honorable Thomas E. Scott prior to his resignation from the federal bench in October 1990. Subsequently, the parties stipulated to a trial before the Honorable United States Magistrate Judge Ted E. Bandstra.

On September 30, 1992, Magistrate Judge Bandstra issued a 59-page Memorandum Opinion and ORder which set forth in detail his findings of facts and conclusions of law. Essentially, Magistrate Judge Bandstra found that the case arose out of the termination of the dealer agreement and the collection of debts owed by GTI and Baeza Sr. to Yale as a result of the business relationship between GTI, Baeza Sr. and Yale. Magistrate Judge Bandstra concluded that Yale terminated the dealer agreement because it found that GTI was submitting false requests for special discounts and false warranty claims for the Yale equipment. Yale later discovered that GTI was also representing to customers that certain Yale equipment was new when in fact it was used equipment. And finally, Yale also later discovered that GTI had altered some Yale equipment to represent a false lifting capacity of the equipment to customers.

Magistrate Judge Bandstra also determined that Yale had initiated in bad faith involuntary bankruptcy proceedings against GTI.

As a result of his findings, Magistrate Judge Bandstra entered an Amended Final Judgment on April 28, 1993. This Amended Final Judgment awarded Yale $1,139,528 against GTI and

Baeza Sr. In addition, the Amended Judgment made an award against Yale in favor of GTI in the amount of $586,777 in punitive damages and attorneys' fees for the wrongful bankruptcy filing.

On October 18, 1993, Magistrate Judge Bandstra awarded Yale the additional amount of $2,279,181.36 against GTI and Baeza Sr. as attorneys' fees and costs incurred by Yale.

Yale attempted to collect on the judgment and was unsuccessfull. Therefore, supplementary proceedings ensued and the case became known as General Trading Inc. (plaintiff) v. Yale Materials Handling Corp. (defendant/counterclaimant/and supplementary plaintiff) v. General Trading, Inc., Gonzalez Trading, Inc., Jose M. Baeza, Sr. Jose M. Baeza, Jr. and Javier Baeza (counterdefendants/and supplementary defendants) and Power Depot, Inc., Michele M. Baeza and Encarnacion Gonzalez f/k/a Encarnacion Baeza (supplementary defendants), 88-61-CIV-ZLOCH. Through theses proceedings, Magistrate Judge Bandstra agreed that GTI and Baeza Sr. had made fraudulent transfers of property for the purpose of rendering themselves judgment proof. Accordingly, Magistrate Judge Bandstra invalidated these transfers and appointed a receiver for the purposes of assisting Yale in locating and seizing GTI's and Baeza Sr.'s assets in Florida and Puerto Rico.

The Final Judgment on Yale Material Handling Corporation's Claims Against Supplementary Defendant Jose M. Baeza, Jr. dated April 15, 1994, the Court found that Baeza Sr.'s transfer of a Yacht to his son Baeza Jr. was fraudulent. Therefore Magistrate Judge Bandstra set aside and voided the transfer. Furthermore, Magistrate Judge Bandstra also ordered that Yale had a lien on the vessel superior to any interest of Baeza Jr. or his successors in interest.

On April 15, 1994, James S. Feltman, C.P.A. of Arthur Anderson & Co., Miami, Florida, was appointed as permanent receiver with the full power of an equity receiver for counter-defendants Baeza Sr. and GTI.

On or about May 9, 1994, Gonzalez and Baeza Jr. filed their Motion to Determine this Court's and Magistrate's Subject Matter Jurisdiction challenging Magistrate Judge Bandstra's authority to issue judgments in the Bandstra/Zloch Litigation. Judge Bandstra denied this motion. This determination was appealed to the Eleventh Circuit and is still pending. In addition, Baeza Jr. and Gonzalez also filed a motion with Judge Zloch contesting Judge Bandstra's authority. Judge Zloch ruled that he did not have jurisdiction to entertain such a review because of the pending appeal. However, Judge Zloch noted in his Order dated October 24, 1994, that Gonzalez and Baeza Jr. had validly consented to the jurisdiction of Magistrate Judge Bandstra for Judgment.

On December 13, 1994, an Order granted Receiver James S. Feltman's Urgent Motion Authorizing Receiver to Take Possession of Asset. This Order was issued by the United States District Court for the District of Puerto Rico (Gimenez, J.), in General Trading, Inc. v. Yale Materials Handling Corporation, etc., Misc. 93-0007(PG)/88-0061-CIV-ZLOCH/-BANDSTRA. This order authorized Feltman as receiver to take possession of the Bertram Yacht which was located in Puerto Rico. It is this seizure that forms the basis for the complaint in the case at bar.

On March 23, 1995, Magistrate Judge Bandstra issued an Order Certifying Facts for Contempt and Order to Show Cause. In this Order, Magistrate Judge Bandstra found that the Baeza defendants had repeatedly defied court orders and ordered the parties to appear before Judge Zloch.

On January 5, 1995, the instant action was instituted in the United States District Court for the District of Puerto Rico. The action was subsequently transferred to this district on the motion of defendants pursuant to 28 U.S.C. § 1404(a).

Several motions are pending. However, the Court finds that determination of Renewed Motion to Dismiss and Memorandum of Law (DE 14) and Defendants' Cross-Motion for

Summary Judgment (DE 18) are dispositive of the issues in this case.

DISCUSSION

I. Standards for Motions to Dismiss and for Summary Judgment

Since the Court is evaluating both a motion to dismiss and a motion for summary judgment, the standards for both types of motions are set forth below.

A. Motions to Dismiss

A motion to dismiss is appropriated when it is demonstrated "beyond doubt that the plaintiff can prove no set of facts in supporting of his claim which entitle him to relief." Conley v. Gibson, 355 U.S. 41, 46, 78 S.Ct. 99, 102 (1957).

B. Summary Judgment Standards

Summary Judgment may be granted when the evidence in the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the burden of production. Addickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). When the moving party has met this burden by offering sufficient evidence to support the motion, the party opposing must then respond with affidavits or other evidence that establishes the existence of a genuine issue of material fact. Addickes, 398 U.S. at 160, 90 S.Ct. at 1609.

In making this determination, the Court must decide which issues are material. The Supreme Court has stated that "[o]nly disputes over facts that might affect the outcome of the suit

under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

The Court must also determine whether the dispute about a material fact is indeed genuine. In other words, is the "evidence...such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

Finally, a plaintiff cannot defeat a motion for summary judgment by resting on the conclusory allegations in the pleadings. Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 248-49, 106 S.Ct. at 2510. Nor will a summary judgment motion be defeated merely on the basis of a "metaphysical doubt" about the material facts, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). This is especially true for those issues on which the non-moving party would bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986).

II. Conflicts of Law

In this case, the sufficiency of certain state law tort claims must be evaluated. Generally speaking, federal courts must apply the conflicts principles of the state in which they sit to determine which state law to apply to the state law claims. VanDusen v. Barrack, 376 U.S. 612, 639, 84 S.Ct. 805, 821, 11 L.Ed.2d 945 (1964). However, when a case is initially filed in one state and transferred to another state on the motion of the defendant pursuant to 28 U.S.C. § 1404(a), the conflicts principles of the transferor state must be applied. VanDusen, supra, 376 U.S. at 639, 84 S.Ct. at 821. Therefore, in this case, the conflicts principles of Puerto Rico apply.

Puerto Rico has adopted the "dominant or significant contacts" test for contract and tort actions. A.M. Capen's Co.

Inc. v. American Trading and Production Corporation, 74 F.3d 317, 319 (1st Cir. 1996). Under this test, "the law of the state with the most significant relationship to 'the occurrence and the parties' controls" in a tort case. Id. at 320, citing to, Restatement (Second) of Conflict of Laws § 145 (1971). The factors to be considered include the following:

a. The place where the injury occurred;

b. The place where the conduct causing the injury occurred;

c. The domicil, residence, nationality, place of incorporation and place of business of the parties; and

d. The place where the relationship, if any, between the parties is centered.

Id. at 320, citing to, Restatement (Second) of Conflict of Laws § 145 (1971).

Under this test, it appears that Florida law would apply. Although the actual tort complained of in the instant action is grounded on the seizure of a yacht in Puerto Rico, the dispute herein arises from and is inextricably intertwined with extensive litigation that occurred in the Southern District of Florida. Therefore, the relationship between the parties is centered in Florida and Florida is the form which has the most significant relationship to the occurrence and the parties at issue.

III. Count I: Abuse of Process

Although it is not entirely clear from the allegations in the complaint, the Plaintiff's First Cause of Action appears to be a claim for abuse of process against the defendants.

Abuse of process is the willful and international misuse of legal process for some wrongful or unlawful purpose other than that for which it was designed. Bothmann v. Harrington, 458 So.2d 1163, 1169 (Fla. 3rd DCA 1984). "There is no abuse of process, however, when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior purpose." Bothmann, 458 So.2d at 1169. "In other words, the usual case of abuse of process involves some form of extortion." Id.

The elements for a cause of action for abuse of process are as follows: (1) defendant made an illegal or improper use of process; (2) defendant had an ulterior motive or purpose in making the illegal or improper use of process; and (3) the plaintiff was injured as a result of defendant's action. Thomson McKinnon Secur., Inc. v. Light, 534 So.2d 757, 760 (Fla. 3rd DCA 1988).[1]

The Defendant's seizure of the Pit Bull yacht was done pursuant to a court order that was granted as a result of the Bandstra/Zloch Litigation. As evidenced from the record, Feltman was acting to enforce prior orders of this court which were issued by Magistrate Judge Bandstra in the Bandstra/Zloch Litigation. Since Feltman was acting in accordance with and for the purpose of enforcing the orders issued in the Bandstra/Zloch Litigation, Feltman's actions were neither illegal

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[1] Under the law of Puerto Rico, the elements of a cause of action for abuse of process are similar. In Puerto Rico, before a plaintiff can prevail on the tort of abuse of process, he must establish that the defendant "was motivated by an ulterior purpose in bringing legal proceedings against plaintiffs and that the proceedings resulted in a perversion of a judicial process and the achievement of some end not contemplated in the regular prosecution of the charge." Harrington v. U.S., 748 F. Supp. 919. 934 (D.Puerto Rico 1990) (citations omitted).

or improper. Accordingly, the First Count of the Complaint is hereby DISMISSED.

IV. Count II: Intentional Infliction of Emotional Distress

The elements of intentional infliction of emotional distress are as follows: (1) deliberate or reckless infliction of mental suffering by defendant; (2) by outrageous conduct; (3) which conduct must have caused the suffering and the; (4) suffering must be severe. Golden v. Complete Holdings, Inc., 818 F.Supp. 1495, 1498 (M.D. Fla. 1993); Metropolitan Life Insurance Co. v. McCarson, 467 So.2d 277, 278 (Fla. 1985). The conduct must be so outrageous that it must "go beyond all bounds of decency and be regarded as atrocious, and utterly intolerable in a civilized community. Metropolitan Life Insurance, 467 So.2d at 278-279.[2]

The facts of the present case fail to establish the requisite conduct that warrants a determination of intentional infliction of emotional distress. Plaintiff's intentional infliction of emotional distress claim is apparently the result of the Defendants' seizure of the Pit Bull yacht. However, as discussed above, the seizure of the Pit Bill yacht was done

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[2] The law of Puerto Rico is in accord. In Puerto Rico, a plaintiff satisfactorily alleges a cause for the tort of intentional infliction of emotional distress when he can demonstrate that defendant's conduct was so extreme and outrageous that it intentionally or recklessly caused him severe emotional distress. Santiago-Ramirez v. Secretary of Defense, 62 F.3d 445 (1st Cir. 1995). Moreover, under the law of Puerto Rico, before a prima facie case for intentional infliction of emotional distress can be established, the conduct complained of must be extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community. Id.

pursuant to a proper Court Order. Therefore, Defendants' conduct, with respect to the seizure of this vessel falls far short of the outrageous and intolerable behavior required by the case law. Therefore, the Second Cause of Action must be DISMISSED.

V. Count III: Defamation

Under Florida law, the elements of a cause of action for defamation are as follows: (1) a defamatory statement concerning the plaintiff; (2) publication to a third party; (3) negligence in the publication; and (4) damages. See The Miami Herald Publishing Company v. Ane, 423 So.2d (1984), citing to Restatement (Second) of Torts §580B (1977); See also, Restatement (Second) of Torts, § 558 (1977).[3]

If the publication was privileged, the publisher of the statement cannot be held liable. Privileged communications include a fair and true report of a judicial proceeding. Huszar v. Gross, 468 So.2d 512, 516 (Fla. 1st DCA 1985).

In addition, Florida imposes by statute other requirements for a cause of action of defamation that are not relevant in the case at bar. See Fla. Stat. Ann. §§ 770.01, et. seq. (West 1986).

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[3] The law of Puerto Rico is in accord. Pursuant to 32 L.P.R.A. § 3141 et seq., libel is defined as the malicious defamation of a person made public by writing, printing, or other mechanical mode of publication tending to subject him to public hatred or contempt or to deprive him of the benefit of public confidence and social intercourse, or to injure him in his business, or in any other way to throw discredit, contempt or dishonor upon him. 32 L.P.R.A. § 3142. 32 L.P.R.A. § 3144 also provides that privileged communications (i.e., a fair and true report of a judicial legislative, or any other proceeding) shall be presumed to be malicious.

In the case at bar, plaintiffs claim that they were defamed as a result of a Court Order that was posted prominently on the Pit Bull yacht. This order stated as follows:

> BY ORDER OF THE UNITED STATES DISTRICT COURTS FOR THE DISTRICTS OF FLORIDA AND PUERTO RICO, THIS VESSEL IS NOW UNDER THE JURISDICTION OF THOSE COURTS AND IN THE CUSTODY OF J.S. FELTMAN.

The document in question is an accurate representation of an order of the court. Therefore, it is a privileged communication which cannot form the basis for a cause of action of defamation. Therefore, Count III of the Complaint must be DISMISSED.

VI. Count IV: Violations of the Fourth and Fifth Amendments of the United States Constitution

The Fourth Cause of Action in the Complaint seemingly alleges a violation of 42 U.S.C.A. § 1983 based on the Fourth and Fifth Amendments of the United States Constitution.[4]

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[4] Plaintiffs' "Fourth Cause of Action" states:

19. Plaintiff reallege the contents of all the foregoing paragraphs and further aver that the ex-parte seizure and arrest of the pleasure Yacht (sic) "Pit-Bull" was done in violation of the Fourth and Fifth Amendment to the U.S. Constitution and such acts were and constitute actionable conduct, in an illegal and unlawful seizure of private property, without notice, hearing or bond, the much more outrageous in that the business address of Plaintiff BAEZA was and in known to all defendants, and there exists well known court decisions that forbid any such ex-parte illegal self serving tortious acting, i.e., United States v. Cook Real Property, 126 L.Ed. 490 (1993);

However, as mentioned previously, the seizure of the Pit Bull yacht was done pursuant to valid Court Orders which issued in the Bandstra/Zloch Litigation between the parties. Therefore, there was no illegal deprivation of property and no violation of 42 U.S.C. § 1983. Therefore, Count IV is hereby DISMISSED.

VII. Count V: Action to Declare Judgment in Prior Action Void Ab Initio and Punitive Damages

Plaintiff's Fifth Cause of Action appears to attack the jurisdiction of the Magistrate Judge in the District of Puerto Rico to issue an order granting the defendants permission to seize the Pit Bull yacht. The main contention of plaintiffs is that the underlying judgment which was enforced by the District Court of Puerto Rico was void ab initio due to the lack of consent to Magistrate Judge Bandstra's entering the judgment in the Bandstra/Zloch Litigation. However, a review of the record shows that there was consent to Magistrate Judge Bandstra's conducting trial in the Bandstra/Zloch Litigation and

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Soldal v. Cook County, 506 U.S.___, 121 L.Ed. 450 (1992); Connecticut v. Doher, 500 U.S. 1, 115 L.Ed. 1 (1991). The law is the same in the Commonwealth of Puerto Rico. See Rodriguez v. Stowell, CA 93-96. In this case there were not even supporting affidavits presented, and what is worse, without the issuing Magistrate Judge having, as it did not have in this case, personal or federal subject matter jurisdiction in that the seizure did not and could take place in this case but under a statute or constitution and was only based here on mere unsworn (sic) allegations of an attorney and without there being any recorded judgment upon which to try to rest the federal subject matter jurisdiction which allegedly was then to support the Magistrate in so acting.

entering judgment therein. Furthermore, the record reveals that this same objection to Magistrate Judge Bandstra's jurisdiction was raised and rejected in the Bandstra/Zloch Litigation. Currently, the issue is pending before the Eleventh Circuit Court of Appeals and should not be relitigated here. Therefore, Count V is hereby DISMISSED.

VIII. Count VI: Request for Attorneys' Fees and Costs Pursuant to 28 U.S.C. § 1927

This is not a substantive count, but is merely a request for relief through attorneys' fees and costs. In light of the fact that the substantive counts of the complaint have been dismissed, Count VI must also fail. Therefore, Count VI is hereby DISMISSED.

IX. Res Judicata and Collateral Estoppel

Even if the counts of the complaint were sufficient to survive a Rule 12(b) (6) motion, the Court also finds that this case should dismissed through defendants' cross-summary judgment motion on the grounds of res judicata and collateral estoppel.

Res judicata ensures the finality of a decision by a court. Under the doctrine, a final judgment on the merits bars further claims by the parties based on the same cause of action. Ray v. Tennessee Valley Authority, 677 F.2d 818, 821 (11th Cir. 1982), cert. den., 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 (1983).

To establish that a cause of action is barred by res judicata, the following elements must be established; (1) final judgment on the merits of a prior action; (2) identity of causes of action; and (3) identity of the parties of their privies in the prior suit. United States v. Timmons, 672 F.2d 1373, 1377 (11th Cir. 1982); Ray, 677 at 821.

The test for determining whether the causes of action are the same is whether the primary right and duty or wrong are the same in each case. Ray, 677 F.2d at 821. In determining whether the causes of action are the same, the substance of the actions, not the form, controls. Ray, 677 F.2d at 821. When the propriety of a court's jurisdiction has been previously litigated, the principles of res judicata apply. Timmons, 672.

In addition, res judicata applies to parties and their privies. Privity is established when a party and a non-party have a sufficiently close relationship to justify binding or protecting the non-party with a judgment that was entered in favor or against the party. Hart v. Yamaha-Parts, 787 F.2d 1468 (11th Cir. 1986). such a relationship exists when (1) a non party succeeds to a party's interest; (2) a non-party controlled the original action; or (3) a non-party's interests were represented adequately by a party in the original suit. Southwest Airlines Co. v. Texas International Airlines, 546 F.2d 84 (5th Cir. 1977), cert. den., 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977).

Collateral estoppel forecloses relitigation of a matter that has been litigated and decided. Hart, 787 F.2d at 1473. Collateral estoppel, unlike res judicata, is not limited to parties and their privies. A defendant who was not a party to the original action may invoke collateral estoppel against the plaintiff. Hart, 787 F.2d at 1473.

To establish collateral estoppel, the following elements must be met: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier action. Hart, 787 F.2d at 1473.

Based on the principles set forth above, the Court finds that the instant action is barred by the principles of res judicata and collateral estoppel.

First, judgments were rendered against Baeza Jr. and Gonzalez in The Bandstra/Zloch Litigation. These judgments established that both parties had received fraudulent transfers from Baeza Sr. and that Baeza Jr. had received a fraudulent transfer of the Pit Bull yacht from Baeza Sr. Furthermore, the issue of Magistrate Judge Bandstra's jurisdiction over the Bandstra/Zloch Litigation was specifically decided by both Magistrate Judge Bandstra and United States District Judge Zloch. These orders declaring the validity of Magistrate Judge Bandstra's jurisdiction are currently being reviewed by the United States Court of Appeals for the Eleventh Circuit.

Second, there is an identity of causes of action and issues because the instant action directly tries to relitigate the issues of the validity of the seizure of the Pit Bull yacht, the authority of Feltman to act as receiver, and the validity of Magistrate Judge Bandstra's jurisdiction to issue final judgments in the Bandstra/Zloch Litigation. These issues were clearly decided in the Bandstra/Zloch Litigation.

Third, there is an identity of parties. All the parties in this suite were parties in the Bandstra/Zloch Litigation except for NACCO. However, under the allegations of the complaint, NACCO is charged with controlling Yale's and Feltman's actions in seizing the Pit Bull yacht, and therefore, NACCO is in privity with Yale. Even if NACCO was not in privity with Yale, it could still bar relitigation of the dispositive issues in the case at bar because such issues have actually been decided and fully litigated in the Bandstra/Zloch Litigation.

Therefore, this Court finds that there is no genuine dispute of material facts which would prevent it from granting summary judgment. The instant action is barred by the principles of res judicata and collateral estoppel. Therefore, defendants' cross-summary judgment motion is hereby GRANTED.

CONCLUSION

In light of the above, it is ORDERED AND ADJUDGED as follows:

1. Renewed Motion to Dismiss and Memorandum of Law (DE 14) is GRANTED; and

2. Defendants' Cross-Motion for summary Judgment (DE 18) is GRANTED. It is further

ORDERED AND ADJUDGED that this case is DISMISSED IN ITS ENTIRETY. It is further

ORDERED AND ADJUDGED that the parties shall brief the issue of Rule 11 Sanctions with more particularity. Defendants shall file a Motion for Rule 11 Sanctions on or before March 29, 1996. Plaintiffs shall file an Opposition on or before April 15, 1996. Defendants may file a Reply on or before April 25, 1996. It is further.

ORDERED AND ADJUDGED that all pending motions are DENIED AS MOOT.

DONE AND ORDERED in chambers at Miami, Florida, this 13th day of March, 1966.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Johnson
Counsel of Record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 96-4410

D.C. Docket No. 95-809-CIV-DLG

JOSE M. BAEZA, JR.,
GONZALEZ TRADING, INC.,

Plaintiffs-Appellants,

verses

NACCO INDUSTRIES, INC.,
JAMES S. FELTMAN,
YALE MATERIALS HANDLING CORP.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(September 3, 1997)

Before EDMONDSON, Circuit Judge, KRAVITCH and WOOD, Senior Circuit Judges.

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

* Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 96-4410

JOSE M. BAEZA, JR.,
GONZALEZ TRADING, INC.,
Plaintiffs-Appellants,

verses

NACCO INDUSTRIES, INC.,
JAMES S. FELTMAN,
YALE MATERIALS HANDLING CORP.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, ____F.2d____).
Before EDMONDSON, Circuit Judge, KRAVITCH and WOOD*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

MORNING, HAVE YOU?

A. I HAVE NOT BEEN TO PUERTO RICO WITH RESPECT TO THE YACHT TRANSACTION OR THE REAL ESTATE ISSUES THAT I JUST TESTIFIED TO.

Q. DID YOU FILE THE ORDER OF YOUR APPOINTMENT ANYWHERE IN PUERTO RICO WITHIN 10 DAYS OF THE ORDER OF APPOINTMENT - -

A. I DID NOT.

Q. --TO BE ABLE TO TAKE PROPERTY IN PUERTO RICO?

A. I DID NOT FILE THE ORDER APPOINTING ME IN PUERTO RICO.

Q. WHY DIDN'T YOU FILE--

MR. ALLEN: YOUR HONOR -- PARDON ME, MR. SALAS.

YOUR HONOR, I JUST WANT THE RECORD TO BE CLEAR, I THINK IT IS ABUNDANTLY CLEAR, BUT IT IS OUR POSITION THAT THERE HAVE BEEN PREVIOUS REFUSALS TO COMPLY WITH ORDERS TO SHOW CAUSE TO PRESENT THE KIND OF TESTIMONY AND EVIDENCE I RELIEVE MR. SALAS IS TRYING TO ELICIT FROM MR. FELTMAN AT THIS TIME. THE RIGHT TO DO SO, TO CONTEST THE FACTS HAVE BEEN WAIVED ON NUMEROUS OCCASIONS. WE OBJECT TO THAT OPPORTUNITY BEING PROVIDED HERE.

THE COURT: ALL RIGHT. LET'S PROCEED.

I WILL OVERRULE THE OBJECTION AT THIS POINT.

LET'S PROCEED.

BY MR. SALAS:

Q. MR. FELTMAN, DID YOU KNOW YOU HAD TO FILE YOUR ORDER OF APPOINTMENT IN PUERTO RICO WITHIN 10 DAYS OF YOUR

APPOINTMENT IN ORDER FOR YOUR ACTIONS TO BE VALID IN PUERTO RICO, ANOTHER JURISDICTION?

A. I LEARNED LATER THAT I WAS REQUIRED TO FILE THE ORDER WITHIN 10 DAYS, AND I DID NOT KNOW THAT AT THE TIME.

Q. AND TODAY HAVE YOU FILED UP TO TODAY, HAVE YOU FILED YOUR ORDER OF APPOINTMENT?

A. I HAVE BEEN TOLD THAT THERE WOULD BE NO POINT IN THAT, THAT THE ORDINARY TO NEED TO BE FILED WITHIN 10 DAYS IN PUERTO RICO. IT WAS FILED HERE.

Q. WHO TOLD YOU THAT? MAGISTRATE JUDGE BANDSTRA TOLD YOU NOT TO FILE IT?

A. NO. MR. ALLEN TOLD ME THAT FILING IT GREATER THAN 10 DAYS WOULD PRODUCE NO RESULT.

Q. OH, THAT WAS HIS ADVICE TO YOU. AND YOU FOLLOWED HIS ADVICE AND YOU HAVEN'T FILED IT UP TO TODAY?

A. THAT IS CORRECT. IN PUERTO RICO, TO THE BEST OF MY KNOWLEDGE, THE ORDER APPOINTING RECEIVER HAS NOT BEEN FILED WITH THE COURT.

Q. AND ALL THIS STATEMENTS THAT YOU STATED ABOUT OBSERVATIONS OF THE NUMBERS, YOU DIDN'T SEE THOSE ALTERATIONS BECAUSE YOU HAVEN'T BEEN IN PUERTO RICO HAVE YOU?

A. I HAVE NOT PHYSICALLY SEEN THEM. I HAVE SEEN PICTURES. I HAVE REPORTS OF PERSONS IN MY EMPLOY, BUT I DID NOT FEEL THAT I NEEDED TO GO TO PUERTO RICO TO DO WHAT PEOPLE IN